Supreme Court, U.S.
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No. 01-1882

IN THE
SUPREME COURT OF THE UNITED STATES

THE CITY OF LONG BEACH,

Petitioner,

vs.

JOHN B. FAIRLEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

ROBERT MANN, *Counsel of Record*
ROBERT MANN AND DONALD W. COOK
3435 Wilshire Blvd., Suite 2900
Los Angeles, California 90010
Telephone: (213) 252-9444

Attorneys for Respondent

QUESTIONS PRESENTED

1. Is it reasonable under the Fourth Amendment to arrest a person under a warrant for the person's twin, on the ground that the twins have the same birthdate and similar physical descriptions, where the twins have different first names, and it is known that the person being arrested has a twin?

2. Where a person is arrested under a warrant for a person with a different name, under circumstances indicating that the person arrested may well not be the person for whom the warrant was issued, does due process require the arresting agency to use readily available procedures for decreasing the risk of erroneous detention, or may the arresting agency, despite protests of innocence, simply ignore all evidence that it has arrested the wrong person?

3. Where a plaintiff fails to carry his burden of proving, by a preponderance of the evidence, that one of several persons possibly responsible for a constitutional violation should be held personally liable, and other persons who are possibly responsible are not defendants, and the named defendant seeks to shift responsibility to the unnamed persons, does a jury's decision not to return a verdict against the named defendant necessarily mean that the plaintiff has not suffered a constitutional injury?

4. Where a plaintiff fails to carry his burden of proving, by a preponderance of the evidence, that an individual defendant should be held personally liable for a constitutional violation, and all of the defendants, including the individual defendant's public entity employer, claim that individual defendant acted reasonably because he acted in accordance with the training provided by the public entity employer, and therefore should not be held personally liable

and, despite request, the jury is not instructed that "following orders" is not a defense, does a jury's decision not to return a verdict against the individual defendant necessarily mean that the plaintiff has not suffered a constitutional injury?

5. Where a public entity admits, in response to Requests for Admissions, and in the testimony of its "chief policymaker" and employees, that its employees acted "in accordance with and pursuant to the policies and practices" of the entity, is there sufficient evidence upon which to base a determination that the employees in question acted pursuant to the customs, practices or policies of the entity; or is custom, practice and policy only provable through circumstantial evidence that employees have done the same thing on other occasions?

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STATEMENT OF THE CASE

Fairley v. Luman, 281 F.3d 913 (9th Cir. 2002), is a thoughtful, well-founded and routine application of the principles set forth in *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979), *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986), *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) for determining when a public entity may be held accountable after arresting the wrong person. No significant conflicts have developed among the federal or state courts. In short, the standards of Rule 19 have not been met and this petition should be denied.

Fairley arises from a jury verdict that the City of Long Beach was liable for violating respondent's civil rights "'by reason of a policy, custom, or practice of the Long Beach Police Department.'"

The policy causing Mr. Fairley's injuries was petitioner's failure to institute "readily available procedures for decreasing the risk of erroneous detention." Petition, *Appendix A*, at 8a.

The violations "were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department." Petition, *Appendix A*, at 6a.

FACTS

On April 26, 1997, Long Beach police officers Romero and Javellana mistakenly arrested respondent John B. Fairley

for violating a restraining order. Not knowing the difference between an *ex parte application* for a restraining order and an actual *order*, they arrested Mr. Fairley for coming within *fifty* yards of his neighbor *Jeffrey* Adams, even though the *order* (as opposed to what was sought in the *ex parte application*) only prohibited Mr. Fairley from approaching within *five* yards of his neighbor *Chrystalynn* Adams, only.[1] When the officers called in to verify that the order had been filed with the department, unknown department employees did not know to inform the officers *what* the actual order prohibited, or *to whom* it applied.[2]

All of the defendants, in response to a F.R. Civ. P. Rule 36 Request for Admissions, admitted that Mr. Fairley's arrest for violation of a restraining order was in accordance with and pursuant to the customs, practices and policies of the Long

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[1] The officers had never been trained to distinguish between an application for an order and an order. RT 118:20-23. They didn't realize that an order requires action by a judicial officer. RT 159:8-12. The officers thought the stamp showing the *ex parte* application had been *filed* was all that mattered. RT 119:1-14, 181:4-21, 183:6-8. The officers had been trained that the *ex parte* application was a valid order until "they go to court a second time." RT 157:18-19. Also, they had never been trained to ask for a certified copy of the order, RT 159:13-15, though California law so requires. RT 481:11–82:8 (defense expert). The *ex parte* application stated, on each pre-printed page, "This is **NOT** an order," CR 1,2,5; RT 120:25–121:25, 182:9-14, 211:5-21.

[2] The Department had on file a copy of the order, showing it had no application to Jeffrey, and only ordered Mr. Fairley to stay five yards away from Chrystalynn. RT 232:15-21. Following department procedure, the officers called dispatch, who told them a valid order was on file, but the officers did not ask and were not told that the order did not apply to Jeffrey, or what the terms of the order actually were. RT 183:18–184:12, 215:10–216:8, 217:3-18, 218:4-7. Pursuant to Department policy, nobody was required to look at the order to see whether there was any violation, and nobody did. RT 243:16-22. The only concern was whether an order was on file, had been served, and had not expired. RT 297:6-9, 311:22–312:8.

Beach Police Department. RT 620:25–621:4. At trial, each defendant and the Chief of Police, Robert Luman, the "chief policymaker for law enforcement matters for the City of Long Beach," CR 167 (Luman 6:24–7:1), testified that their arrest of Mr. Fairley for violating a restraining order was in accordance with Department policy. RT 192:2-6, 217:19-24 ("perfectly in accordance with the training and procedures and policy of the Long Beach Police Department"). Chief Luman testified that Department policy did not require the officers to ask who the order applied to and that no one was required to tell them. CR 199 (Luman 38:7-12).[3]

Since Long Beach policy "strictly prohibited" officers from handcuffing people in front, and "strictly require[d] that a person be handcuffed behind the back when transported in a squad car," regardless of physical condition, RT 145:22–146:7, 167:10-18; 492:2-5, the officers insisted on handcuffing Mr. Fairley behind his back, even though Mr. Fairley had a very serious shoulder injury which required him to wear a sling and walk with a cane. As a consequence, the officers re-

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[3] After Mr. Fairley's release, he returned to the Department and complained that he had been wrongly arrested. RT 664:16-128. Under California law, the Department was required to conduct an investigation. RT 314:17-24. The Department conducted what it claimed to be an investigation. During the investigation, it never looked at the restraining order, RT 388:19–389:23, CR 266 (Luman 105:13–106:4), and did not inform any of the employees involved (including both defendants and those not named as defendants) that they had erroneously arrested and booked Mr. Fairley for violating a restraining order. RT 123:4-21, 184:14-18, 191:16-20, 246:5-8 (clerk Retha Edmonson), 247:1-21 (same), CR 268 (Luman 107:2-12). The Department never told any of the officers that somebody should have asked to see a copy of the order, looked at a copy of the order, or asked someone else to verify to whom the order applied and what its terms were. RT 123:12–124:3, 184:14-18, 191:21–192:1, CR 204 (Luman 43:12-17). According to both the Department's designated agent and Chief Luman, the Department's investigation was perfectly adequate. RT 400:20–401:10, CR 180 (Luman 19:7-10, 20:5-11, 104:21–105:1).

dislocated Mr. Fairley's shoulder and exacerbated Mr. Fairley's injury.

After arresting Mr. Fairley, Officers Romero and Javellana ran a warrant check. They found two warrants for ***Joseph*** Benjamin Fairley, Mr. Fairley's twin. RT 521:19-21, 522:7-11, 523:1–524:8. Mr. Fairley and his wife told the officers he had a twin, Joe, and the warrants had to be Joe's. RT 580:10-20, 620:20-24 (Request for Admissions Response), 124:18-125:4, 643:12-14, 185:18-25. The arresting officers had no doubt that Mr. Fairley did have a twin because the application for a restraining order said he did. CR 1, RT 125:20–126:15, 184:19–185:3, 186:1-4; 187:13 ("There's no doubt that he had a twin brother."); 189:8-10 (same).[4] The officers knew "there was a big question about whether or not the John Fairley . . . in custody was the Joe Fairley who was identified in the two warrants." RT 187:21-23, 190:2-4 (officers knew "these warrants may well not be Mr. Fairley's").

Romero and Javellana did not arrest Mr. Fairley on Joe's warrants because they were unsure if they were for Mr. Fairley. They alerted the booking sergeant, Ford. Romero made certain that Ford knew that Mr. Fairley had a twin. RT 188:15-18, 189:6-20. Ford booked Mr. Fairley on Joe's warrants. RT 249:21–250:1.

At trial, Ford claimed that the decision to book Mr. Fairley was made by "Records Division," "where a fingerprint classifier will classify the fingerprints to verify the person in

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[4] Additionally, Chrystalynn specifically alerted the Department to the fact that Mr. Fairley had a twin. Exhibit 5, AER 193; RT 232:5-7, 417:11–22, CR 262 (Luman 101:13–102:21).

custody is in fact the person he says he is, and any added charges or holds or warrants are verified against fingerprints if they were available." RT 289:12– 290:7, 746:21–747:1. Ford also claimed that DMV records were supposed to be checked by somebody else, a clerk typist. RT 250:19-20.

Determining whether a warrant applies to a particular person is something that law enforcement officers have to do every day. RT 130:11, 287:19, CR 211 (Luman 50:25–51:16). Luman knew twins often have the same last name, physical description, and birth date. RT 282:17-20, CR 212 (Luman 51:17–52:20). It is not uncommon that twins are booked on their twin's warrants. RT 252:2-9. Where officers know that a person has a twin, they have the obligation to investigate whether the warrant is for the twin. RT 418:15-22.

However, pursuant to Department policy, no one did anything to investigate whether either warrant in fact belonged to Joseph, the person named in the warrants, rather than Mr. Fairley. RT 272:2-8, RT 311:11-14, 431:8-19, CR 237 (Luman 76:23–77:22, 79:20–80:10, 85:4-10). The City failed to provide Ford training in how competently to perform his job, RT 279:8–280:16, 281:25–282:16, 287:1-3, in particular with regard to twins. RT 284:14–285:21.

The Department easily could have verified through quickly accessible computer records, but did not, that Joseph B. Fairley existed, and that all of the identifying information on the $1357 Compton warrant, including Joe's DMV number and residence address, exactly matched Joe, not Mr. Fairley. RT 253:2-15, 269:23–270:4, 299:2-16, 300:5-8, 302:3-10, 303:9-23, 305:15-20, 526:17-19, 535:23-24. The Department also could easily and conclusively have determined that the $277 Van Nuys warrant was for Joe, not Mr. Fairley. Joe's fingerprints

were available, 523:10-14, because Joe was booked and fingerprinted on the Van Nuys offense before he was released. RT 529:12-16, 538:21-23, 539:8-12. Had the Department bothered to do so, which it did not, RT 272:2-8, 755:8-13, 757:16-20, 290:17-22, it would quickly have learned those fingerprints belonged to Joe, not Mr. Fairley. RT 270:11-271:8, 463:13 (defense expert: "technology today is quite instantaneous"),753:22–754:1, 756:5-13, CR 217 (Luman 56:20-25).

After learning that he was being booked on his twin's warrants, Mr. Fairley called his wife and told her to bring all of his identification to the jail. RT 653:3-6. Unidentified jail personnel told Mr. Fairley to instruct his wife not to bring the identification. RT 581:11-14, 591:10-12, 653:6-8. In response to Mr. Fairley's complaints that he was being held on his twin's warrants, unidentified jail personnel told him it was his fault he had a twin and that he should change his name. RT 653:17-21. When Mr. Fairley continued to complain, unidentified jail personnel took away his sleeping mat. RT 652:12-13.

All of the defendants, in response to plaintiff's F.R. Civ. P. Rule 36 Request for Admissions, admitted that both warrant arrests were in accordance with and pursuant to the customs, practices and policies of the Long Beach Police Department. RT 621:5-14. At trial, each defendant and the Chief of Police, Luman, testified that their arrests of Mr. Fairley on the warrants were in accordance with Department policy. CR 244 (Luman 83:19-24).

In response to Mr. Fairley's citizen's complaint that he had been arrested on Joe's warrants, the Department, although California law required it to do so, RT 396:6-15, 407:3–8:3, CR 223 (Luman 62:19-23, 63:24–64:4), did nothing to find out

whether Mr. Fairley's complaint was true (*i.e.*, whether the warrants were for Joe), RT 325:10-16, 410:1–411:1, 411:19-23, 431:8-19, and nothing to find out what Sgt. Ford had done or not done before booking Mr. Fairley on the warrants. RT 273:14-18, 274:9-12, 320:19–1:16, RT 416:6-12, CR 226-30, 249-59 (Luman 65:10-16, 66:2-8, 68:25–69:6, 86:14-23, 88:2-7, 90:4-20, 93:11-95:5, 95:24–96:17). The Department did not even find out that Romero had told Ford Mr. Fairley had a twin. RT 433:9-12, CR 262 (Luman 101:8-12). The Department did not care that it had arrested the wrong person. RT 432:4-11 ("his information was a defense for him to use in criminal court").

Mr. Fairley requested jury instructions that, in determining whether the officers had acted in an objectively reasonable manner, their "underlying intent" and/or "reliance on Department policy" were not defenses.[5] These instructions were refused. RT 843:3-5.

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[5] Mr. Fairley's rejected instructions included:

> Whether an officer's actions are "reasonable" under the Fourth Amendment must be determined in light of the facts and circumstances confronting them, without regard to the officer's underlying intent or motivation.

AER 3 (Requested Instruction No. 57).

> A police officer may not justify his conduct on grounds that his conduct was in conformity with the policy or practice of his department. The test is whether the conduct of the officer is objectively reasonable, not whether the officer acted in compliance with department policy or practice.

AER 6 (Requested Instruction No. 61).

ARGUMENT

I. MR. FAIRLEY'S DUE PROCESS RIGHTS WERE VIOLATED.

Petitioner's second question, "may an individual's detention on a valid warrant create a constitutional injury because a City failed to institute an identification procedure that may have disclosed that the prisoner was the wrong person?", does not justify a grant of *certiorari*.

Baker itself makes clear that police do not have *carte blanche*. 443 U.S. at 145-46 ("mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law.'"). Lower courts have consistently recognized that "[t]he *Baker* decision has not been read to preclude all § 1983 claims based on false imprisonment." *Cannon v. Macon County*, 1 F.3d 1558, 1562 (11th Cir. 1993). The "Court . . . suggested that at some point, even though law enforcement officials are proceeding pursuant to a valid warrant in the face of protestations of innocence, detention of that individual would run afoul of the *Constitution.*" *Sanchez v. Swyden*, 139 F.3d 464, 468 n.8 (5th Cir. 1998). "A prolonged confinement of an arrested person without a hearing to determine whether he is the person named in the warrant would be a deprivation of liberty without due process of law and thus violate the Fourteenth Amendment . . . ." *Brown v. Patterson*, 823 F.2d 167, 169 (7th Cir. 1987), *cert. denied*, 484 U.S. 855, 108 S.Ct. 162, 98 L.Ed.2d 117 (1987).

Contrary to petitioner's assertion, Petition 7, *Baker* is

not at all "on all fours with the present case." Since McCollan's brother had "procured a duplicate of Linnie's driver's license," 443 U.S. at 140, the warrant was *issued for McCollan*, and therefore exactly described and *named* McCollan. As a result, the arresting officers "understandably concluded that they had their man," 443 U.S. at 141, and there was consequently "no suggestion that respondent's arrest was constitutionally deficient." 443 U.S. at 143. The Court held that, because a "facially valid warrant," 443 U.S. at 143, had been issued for McCollan, the Due Process Clause did not require defendant to investigate McCollan's complaint, during "three days over a New Year's weekend," 443 U.S. at 145, that the warrant had been erroneously *issued*.

Unlike *Baker*, Mr. Fairley was arrested on warrants issued for another person. Unlike *Baker*, the warrants did not authorize the arrest of a person named *John* Fairley. Unlike *Baker*, Mr. Fairley contended that there was not probable cause to arrest him in the first place. Unlike *Baker*, from the face of the warrants and known information—that Mr. Fairley had a twin brother—it was immediately obvious that there was at the very least grave doubt whether the warrants were for Mr. Fairley. Unlike *Baker*, defendants *never* investigated whether they had the right man.[6]

Courts have expressly recognized that *Baker* is not controlling where "the policeman executed the warrant against the wrong person," *Patton v. Przybylski*, 822 F.2d 697,

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[6] Mr. Fairley was released after twelve days in jail, as the result of a court order. Long Beach did not bother to investigate even after Mr. Fairley returned to the Long Beach Police Department and complained.

699 (7th Cir. 1987) (Posner)[7], even where the person arrested has exactly the same name. 822 F.2d at 698.

Here, Long Beach arrested Mr. Fairley on warrants for somebody else, Mr. Fairley's twin brother, Joseph Benjamin Fairley. Therefore, *Baker* is not controlling.

More significantly, unlike *Baker*, here the warrants on their face authorized the arrest of a person with a different name. The warrants named Joseph Benjamin Fairley, not John Fairley. Because the warrants did not name *John* Fairley, they should not, contrary to petitioner's assertion, Petition 7, be considered "facially valid." Rather, as applied to *John* Fairley, they were facially *invalid*.

In *West v. Cabell*, 153 U.S. 78, 14 S.Ct. 752, 38 L.Ed. 643 (1894), the "the granddaddy of these cases,"[8] the Court held

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[7] *See also Johnson v. Miller*, 680 F.2d 39, 41 (7th Cir. 1982) ("execution against the person named in the warrant does not violate the Fourth Amendment even if, because someone has made a mistake, the person named in the warrant is not the person whom the authorities intended to arrest," citing *Baker*); *Simons v. Clemons*, 752 F.2d 1053, 1054-55 (5th Cir. 1985) (no constitutional deprivation because plaintiff held only 14-16 hours on facially valid warrants for plaintiff, although warrants should not have been in system); *Sanchez v. Swyden*, 139 F.3d at 468 (no constitutional deprivation because plaintiff held only 26 hours on facially valid warrant in plaintiff's exact name, birth date and social security number); *cf. Berg v. County of Allegheny*, 219 F.3rd 261, 273 (3rd Cir. 200), *cert. denied* 531 7U.S. 1072, 121 S.Ct. 791, 148 L.Ed.2d 664 (2001) and *cert denied*, 121 S.Ct. 1081, 148 L.Ed.2d 957 (2001) ("an apparently valid warrant does not render an officer immune from suit if his reliance on it is unreasonable in light of the relevant circumstances. Such circumstances include, but are not limited to, other information that the officer possesses or to which he has reasonable access, and whether failing to make an immediate arrest creates a public threat or danger of flight.")

[8] *Brown v. Patterson*, 823 F.2d 167, 169 (7th Cir. 1987) (Posner), *cert. denied*, 484 U.S. 855, 108 S.Ct. 162, 98 L.Ed.2d 117 (1987).

that "a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him." *West*, 153 U.S. at 85. According to the Court, this "principle of the common law, by which warrants of arrest, in cases criminal or civil, must specifically name or describe the person to be arrested, has been affirmed in the American constitutions; and by the great weight of authority in this country a warrant that does not do so will not justify the officer making the arrest." 153 U.S. at 86. In short, a "particular description in the warrant" is "a constitutional requirement." 153 U.S. at 88.

In *West*, the Court held that arresting Vandy M. West on a warrant naming James West violated the Fourth Amendment, even though the issuing commissioner "'did not know of any other West living at or near Mineral Wells,'" and *intended* that Vandy M. West be arrested.

Cases decided after *Baker* continue to recognize the importance, under both the Fourth and Fourteenth Amendments, of the *name* on the warrant.

In *Brown v. Byer*, 870 F.2d 975 (5th Cir. 1989), the Fifth Circuit held that arresting *Tammy Jean* Brown on a warrant for *Tammie* Brown, 870 F.2d at 977, was *not* an arrest on a "facially valid warrant." In accordance with *West* and common sense, the court held that "[t]he existence of a facially valid warrant for the arrest of one person does not authorize a police officer to effect the arrest of another person, even if the officer believes the second person guilty of the first person's crimes and even if the two people have similar names." 870 F.2d at 979.

The Eleventh Circuit recognized the importance of

name discrepancies in *Cannon v. Macon County*, 1 F.3d 1558,1564 (11th Cir. 1993) and *Rivas v. Freeman*, 940 F.2d 1491, 1492-93 (11th Cir. 1991). Defendants arrested Ms. Cannon when informed that a wanted person had used a name similar to hers as an alias. 1 F.3d at 1560. Despite protestations of innocence and differences in physical descriptions, 1 F.3d at 1560-61, defendants "held Cannon in jail for seven days without making any effort to attempt to determine Cannon's identity." 1 F.3d at 1561-62. Because of the discrepancies, the court held that "Cannon presented sufficient evidence from which a jury could find that Collins acted with deliberate indifference when he completed the arrest procedure and obtained a fugitive warrant for her arrest without speaking to Cannon and without making any attempt to identify her as the person wanted in Kentucky," and violated "Cannon's due process rights." 1 F.3d at 1564.

In *Rivas*, the Eleventh Circuit affirmed a $100,000 judgment against the Sheriff "because he failed to establish sufficient and appropriate procedures and policies regarding identification of arrestees," 940 F.2d at 1495, thus causing deputies to arrest and hold Alfredo *Falcon* Rivas for six days on a warrant for Alfredo *Celestino* Rivas. 940 F.2d at 1493. The court focused on evidence that the sheriff "allowed his deputies to detain individuals even where discrepancies existed." 940 F.3d at 1495.

Therefore, contrary to defendant's characterization, the Fourteenth Amendment question here presented is whether police have *any* obligation to do *any* investigation when they arrest someone *not* named in the warrant who is probably *not* the person wanted on the warrant.

That question also does not justify granting *certiorari*.

The courts have consistently recognized that law enforcement should have adequate procedures for identifying suspects. "Consistent with the dictates of *Harris*, we find that confirming the identity of persons arrested under an arrest warrant is a 'usual and recurring' situation with which police must deal. . . . Compared to *Harris*, we think the identification of suspects presents an even more compelling situation for the application of a failure-to-train theory since the arrest and detention of criminal suspects falls within the regular and ordinary course of police conduct." *Johnson v. City of Chicago*, 711 F. Supp. 1465, 1472 (N.D. Ill. 1989).

In *Rivas*, the court affirmed a judgment against the sheriff "because he failed to establish sufficient and appropriate procedures and policies regarding identification of arrestees, warrantless searches, and computer checks for information." 940 F.2d at 1495.

II. LONG BEACH IS RESPONSIBLE FOR THE VIOLATION OF MR. FAIRLEY'S RIGHTS.

Relying on *Monell* and *City of Canton v. Harris*, Long Beach asks the Court to consider whether it can be held liable for its failure to initiate procedures to reduce the likelihood of detaining the wrong individual on a warrant where there was "no evidence of similar incidents prior to plaintiff's arrest." Question 2; Petition 8.

This evidentiary question does not justify review. Petitioner points to no authority requiring Mr. Fairley to establish defendant's policies and practices through circumstantial evidence ("similar incidents prior to plaintiff's arrest") when there was abundant other evidence, including admissions.

Defendants' responses to Requests for Admissions, admitting that arresting Mr. Fairley on the warrants was "in accordance with and pursuant to the policies and practices of the Police Department of the City of Long Beach," established the facts admitted. F.R. Civ. P. Rule 36 (b); *see Berg v. County of Allegheny*, 219 F.3rd at 276 ("the County conceded that Demko 'followed the practices and procedures which had been in effect at the time she started working'"). So, too, did the testimony of defendant's "chief policymaker for law enforcement matters for the City of Long Beach," CR 167 (Luman 6:24–7:1),[9] that the arrests of Mr. Fairley on the warrants were in accordance with Department policy. CR 244 (Luman 83:19-24).

Neither *Harris* nor any other authority requires "evidence of similar incidents prior to plaintiff's arrest," to establish the obvious, *i.e.*, that determining whether a warrant applies to a particular person, is one of the "usual and recurring situations with which they must deal." 489 U.S. at 390. Nor is evidence of "similar incidents prior to plaintiff's arrest" necessary to prove that twins often have the same last name, physical description, and birth date, are commonly booked on their twin's warrants, and that law enforcement in such cases is "obligate[d] . . . to do some further investigation." RT 418:15-22. Assuming common sense is not enough, these facts may be proven by other evidence, as they were here, through the admissions of the Chief of Police and defendant's designated agent.

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[9] Petitioner's argument, Petition 10 n.4, that the Ninth Circuit "erroneously ruled that Chief Luman was the final policy maker" is frivolous and waived. Chief Luman testified he was "'the chief policymaker for law enforcement matters for the City of Long Beach.'" Petition, *Appendix A*, at 9a. Petitioner never raised the argument in the Ninth Circuit.

Despite having Mr. Fairley's identification and knowing that Mr. Fairley had a twin brother, defendant's policy was simply that, for government w[illegible]k, "John" was close enough to "Joseph." Defendants did not bother with "readily available" information proving Mr. Fairley was the wrong person because it was merely "a defense for him to use in criminal court." RT 432:10-11.

III. NOT FINDING JAVELLANA, ROMERO OR FORD LIABLE DID NOT MEAN MR. FAIRLEY'S RIGHTS WERE NOT VIOLATED.

Relying on *Heller*, Long Beach asks the Court to consider whether it can be held liable for its failure to initiate procedures to reduce the likelihood of detaining the wrong individual on a warrant when a jury has determined that the "individual officers" "did not inflict any constitutional harm?" Question 1; Petition 5.

The question presented does not justify review. *Heller* is premised on the assumption that the "individual officer" must have inflicted the "constitutional harm," if there were any "constitutional harm" inflicted. Here, as the Ninth Circuit correctly observed, the "constitutional deprivations were not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department." Petition, *Appendix A*, at 61.

Petitioner has not even bothered to address the lower court's actual holding, much less try to explain why it is incorrect.

The jury's determination that Romero and Javellana were not responsible for arresting Mr. Fairley on Joe's

warrants is of no significance at all, since they did not arrest Mr. Fairley on Joe's warrants.

At trial, Ford claimed that the responsibility lay in "Records Division," "where a fingerprint classifier will classify the fingerprints to verify the person in custody is in fact the person he says he is, and any added charges or holds or warrants are verified against fingerprints if they were available." RT 289:12– 290:7, 746:21–747:1. Ford also claimed that DMV records were supposed to be checked, by somebody else. RT 250:17-20.

To establish liability against an individual, Mr. Fairley was required to establish by a preponderance of the evidence that that individual defendant violated his rights. Here, because the decision to arrest Mr. Fairley was spread among several people— including City employees not named as defendants— the jury may well have found that someone other that the named individual defendants was actually responsible. For example, it might have been the person who was supposed to check the fingerprints but did not; or it might have been the person who was supposed to alert officers to the fact that the restraining order did not apply but did not. In its brief in the Court of Appeals, as it did in the district court, petitioner itself attempted to shift the responsibility for Mr. Fairley's arrest away from the named individuals by claiming that the "Officers were informed by the police dispatcher that plaintiff Fairley had violated a restraining order . . . ." AB 4; *see also* AB 5 ("officers radioed police dispatch and verified that the restraining order in question was valid and had been served").

The jury probably concluded that the fault for any violation was spread among unnamed City employees, and

that Mr. Fairley simply did not carry his burden of proof as to any named individual. It would have been reasonable to conclude that Romero, Javellana and Ford shouldn't be held personally liable for arresting Mr. Fairley for violating a restraining order because the foul up was due to the failure of the Department to require somebody in Records to inform them of its terms. Similarly, the jury could have concluded that Ford shouldn't be held personally liable for booking Mr. Fairley on Joe's warrants because that error was due to the failure of somebody in Records to check fingerprints or DMV records.

There was obviously more evidence that the City's customs, practices and policies led to the wrongful arrest of Mr. Fairley for violating a restraining order which didn't exist and warrants which weren't his than there was evidence that any named individual should be held personally liable. If the City took people's rights seriously, the Department would have appropriately trained its employees and acted responsibly in the ensuing investigation. The jury acted predictably by placing responsibility on the City for its deficient customs, practices and policies, rather than on officers who were merely doing what they were expected to do. *See* Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 800 (1979) (jurors give police "benefit of any doubt" when "acting in the course of his duties"); Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell in Police Brutality Cases*, 44 Hast. L.J. 499, 548 (1993) ("[J]urors' general sense of fairness mitigates against blaming an officer for causing a constitutional injury when he merely carried out department

policy as an obedient employee.").[10]

Even if the named individuals were the "immediate" cause of Mr. Fairley's injuries, their exoneration would not necessarily mean that Long Beach was not liable.

> If we conditioned municipal liability on an individual police officer's liability in every case, it might lead to illogical results. A municipality would escape liability whenever the conduct of the acting police officer did not meet the "shocks the conscience" standard, even though municipal policymakers, acting with deliberate indifference or even malice, implemented a policy which dictated his injury-causing actions. It is easy to imagine a situation where an improperly trained police officer may be ignorant of the danger created by his actions and inflicts injury. Meanwhile, the city's policymakers, with a wealth of information available to them, are fully aware of those dangers but deliberately refuse to require proper training. The officer may escape liability because his conduct did not "shock the conscience." It does not follow, however, that the city should also escape liability. The city causes the officer to deprive the plaintiff of his

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[10] The strength of the "following orders" defense is profound. Even United States Nuremberg Chief of Counsel for War Crimes, General Telford Taylor, believed that "Article 8 of the Charter, providing that obedience to a superior's command to commit a crime should be considered only in mitigation . . . is flawed. If the defendant did not know, and had no basis for knowing, that the order he had obeyed was unlawful, the defendant should not be held liable at all." Telford Taylor, The Anatomy of the Nuremberg Trial 630 (1992).

> liberty; the city therefore has violated the plaintiff's Fourteenth Amendment rights.

Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3rd Cir. 1994).[11] *See also Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 513 U.S. 1148, 130 L.Ed.2d 1065, 115 S.Ct. 1097 (1995) ("Supervisorial liability may be imposed under section 1983 notwithstanding the exoneration of the officer whose actions are the immediate or precipitating cause of the constitutional injury.").

Rivas is analogous. There, the court affirmed the judgment as to the sheriff, but reversed as to the deputies. The court held that the sheriff was liable because he failed adequately to train his officers regarding reliable identification procedures. The court reversed as to the deputies because their failure to identify correctly the plaintiff did not amount to gross negligence or deliberate indifference to his constitutional rights.

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[11] In *Fagan*, the Third Circuit granted rehearing *in banc* and, contrary to the panel's holding, affirmed the trial court judgment. However, Chief Judge Sloviter's *in banc* opinion stated it was not disturbing the panel's holding regarding *Heller*. *See also Simmons v. City of Philadelphia*, 947 F.2d 1042, 1089 n.1 (3rd Cir. 1991) (Sloviter, C.J., concurring), where Chief Judge Sloviter concluded that "the jury verdict can be upheld on the basis of the City's liability independent of [the line officer's] culpability.").

CONCLUSION

For the foregoing reasons, respondent urges the Court to deny the petition for *certiorari*.

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Respectfully Submitted,

Robert Mann, Attorney of Record
Robert Mann and Donald W. Cook
3435 Wilshire Blvd., Suite 2900
Los Angeles, CA 90010
Telephone: (213) 252-9444
Attorneys for Respondent